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INTERESTS OF *AMICI CURIAE*[1]

The statements of interest of the *amici curiae* are set forth in the Appendix.

SUMMARY OF THE ARGUMENT

In these cases, three prisoners presented their claims at each level of their prison grievance systems, received final decisions on the merits, and still their claims were dismissed for failure to exhaust administrative remedies. The dismissals were based on three Sixth Circuit rules—total exhaustion, pleading with specificity and naming each potential defendant in the grievance—that are judicially imposed, not drafted by state policymakers or prison officials to make the grievance process more effective or efficient. Thus, this case is not about deference to the judgment of prison officials.

Nor is it about deference to Congress. None of the Sixth Circuit's rules has any textual support in the PLRA and they do not further any of the purposes of the PLRA or of exhaustion generally. They neither weed out frivolous claims nor assist prison administrators in resolving complaints. Rather, they "serve no purpose other than the creation of an additional procedural technicality." *Love v. Pullman*, 404 U.S. 522, 526 (1972). Further, contrary to the policy of 42 U.S.C. § 1983 and the right of access to courts, each of the Sixth Circuit's rules imposes substantial, arbitrary barriers to meritorious lawsuits.

In *Woodford v. Ngo*, 126 S.Ct. 2378 (2005), the Court suggested a standard for evaluating exhaustion requirements that is appropriate here. First, are they

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[1] No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief were lodged with the Court by the parties on March 21 and 23, 2006.

necessary to provide prison officials a "fair opportunity" to resolve problems in their facilities? *Id.* at 2388. Second, do they provide prisoners "a meaningful opportunity" to exhaust their grievances and exercise their right of access to the courts? *Id.* at 2392.

Because the Sixth Circuit's rules neither help prison officials resolve problems nor allow prisoners adequate opportunity to obtain a ruling on the merits of their federal claims, the Court should reject each of them and adopt alternatives that are consistent with both the PLRA and § 1983. With respect to total exhaustion, the Court should either reject the total exhaustion rule outright or allow plaintiffs to amend their complaints to delete unexhausted claims so that district courts may consider the merits of those claims—and only those claims—that are fully exhausted. As an alternative to the "name all defendants" rule, the Court should require prisoners to give administrators notice of their *problems* so that the grievance can be fairly resolved. Finally, the Court should recognize, as most circuit courts have, that exhaustion of administrative remedies is an affirmative defense and not part of the plaintiff's claim. At a minimum, the Court must reject the Sixth Circuit's unique and unduly punitive ban on permitting amendment to cure defects in pleading.

If the Court allows these rules to stand, a prisoner's right to access the courts will be effectively eliminated. Since the Sixth Circuit's rules were imposed, *amici*'s research shows that only a tiny handful of prisoners have survived screening under 28 U.S.C. § 1915A. Congress could not have intended such a draconian result. "The exhaustion requirement is a gatekeeper, not a 'gotcha' meant to trap unsophisticated prisoners who must navigate the administrative process *pro se*." *Hooks v. Rich*, No. CV 605-065, 2006 WL 565909, *6 (S.D. Ga. Mar. 7, 2006).

ARGUMENT

I. THE SIXTH CIRCUIT'S RULES ARE SUPPORTED BY NEITHER THE LANGUAGE OF THE PLRA NOR ITS PURPOSES.

The Prison Litigation Reform Act provides that prisoners who wish to bring suit about prison conditions may do so only after "such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). This Court has held that when Congress required exhaustion, it meant "proper exhaustion . . . which 'means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits).'" *Woodford v. Ngo*, 126 S.Ct. 2378, 2385 (2006) (*quoting Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)). Each of the three petitioners did exactly what *Woodford* requires and obtained a final decision from the agency that addressed the merits and did not reject the grievance on any procedural ground. The PLRA requires no more, and the courts are not authorized to throw up new obstacles to prisoners' access to courts as the Sixth Circuit has done in these cases.

A. The Sixth Circuit Has Invented New Exhaustion Requirements Without Any Textual Basis

Even courts espousing the rules requiring total exhaustion, pleading exhaustion with particularity and naming potential defendants recognize that nothing in the language of the PLRA mandates them. *E.g., Ross v. County of Bernalillo*, 365 F.3d 1181, 1190 (10th Cir. 2004) (stating that language of PLRA only "suggests" a total exhaustion requirement); *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1207 (10th Cir. 2003) (noting that pleading burden is not "directly addressed" in PLRA). With respect to the "name all defendants" rule, the PLRA places no content or

specificity requirements on grievances, much less requires that all potential defendants be named in a grievance. The Sixth Circuit has not even attempted to rely on statutory text to support its holding on this issue, instead citing the general purposes of the PLRA. *See Curry v. Scott*, 249 F.3d 493, 505 (6th Cir. 2001).

As to the rules requiring pleading with particularity and total exhaustion, the relationship between the language of the statute and the Sixth Circuit's conclusions is simply too tenuous and requires too many dubious inferences about Congressional intent to be considered a reasonable exercise in statutory interpretation. With respect to the total exhaustion rule, the Sixth Circuit relied heavily on 42 U.S.C. § 1997e(a), which states that no "action" relating to prison conditions may be "brought" before the prisoner exhausts her available administrative remedies. *Jones Bey v. Johnson*, 407 F.3d 801, 807 (6th Cir. 2005). But the reliance on this provision is misplaced. No one disputes that a partially exhausted "action" does not comply with the statute. The question is what to do about it. The command "to kill it rather than to cure it," *Ortiz v. McBride*, 380 F.3d 649, 657 (2d Cir. 2004), reflects an inferential non sequitur that is without support in the statutory language. If Congress had intended a total exhaustion rule, one would expect to find it in the provision governing dismissals, 42 U.S.C. § 1997e(c), but that section is silent on this issue. *Ortiz*, 380 F.3d at 657. Without an express command from Congress, courts should adhere to the "fundamental procedural norm," *Robinson v. Page*, 170 F.3d 747, 748-49 (7th Cir. 1999), that bad claims are dismissed but others are not. *Cf. Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S.Ct. 2611, 2621 (2005) (rejecting "indivisibility" and "contamination" theories, under which jurisdictional defect for one claim or defendant would require entire action to be dismissed).

With respect to its heightened pleading burdens, the Sixth Circuit has merely stated that requiring prisoners to

plead exhaustion with particularity will help "effectuate" the exhaustion requirement of 42 U.S.C. § 1997e(a). *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir. 2000).[2] But courts are not empowered to impose any extra-statutory requirement they believe somehow advances a statutory purpose; otherwise there would be no limit to the judicial gloss that they could place on a statute. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985) ("[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute."). Because the statute is silent on pleading issues, courts should presume that Congress intended that exhaustion under the PLRA would be pled in the same way as exhaustion in other contexts—as an affirmative defense. *See Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) (stating that where Congress is silent, courts should not infer "significant change[s]" in law).[3]

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[2] The Sixth Circuit has also cited Congress' decision to make exhaustion mandatory rather than discretionary, *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir. 1998), but has failed to explain how this fact sheds any light on the proper allocation of pleading burdens. All affirmative defenses are "mandatory" in that the plaintiff cannot prevail if the defendant establishes them. Exhaustion is no different from a statute of limitations, which also requires plaintiffs to meet a condition before filing. Yet the burden to plead and prove the failure to satisfy a limitation period is generally placed on the defendant. Fed. R. Civ. P. 8(c). *See also Perez v. Wisconsin, Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999) (likening exhaustion under PLRA to statute of limitations).

[3] For other contexts in which exhaustion of administrative remedies is a defense, see, e.g., *Granberry v. Greer*, 481 U.S. 129, 132 n.5 (1987); *Downey v. Runyon*, 160 F.3d 139, 146 (2d Cir. 1998); *Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997); *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997); *Brown v. Marsh*, 777 F.2d 8, 13 (D.C. Cir. 1985).

However, even if exhaustion is a pleading requirement for the plaintiff, there is no textual justification in the PLRA for overriding Fed. R. Civ. P. 8, which requires only notice of the claim, not the detailed allegations or document attachments required by the Sixth Circuit. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). In *Baxter v. Rose*, 305 F.3d 486, 489-90 (6th Cir. 2002), the Sixth Circuit belatedly insisted that its heightened pleading standards did not violate Rule 8 because the court's authority came from the PLRA's screening provision, 28 U.S.C. § 1915A. In essence, the Sixth Circuit has said that Congress repealed Rule 8 as it applies to prisoners in the context of exhaustion. But the PLRA does not say that. Rather, § 1915A changes only the *timing* for evaluating a complaint; nothing in those sections purports to change the pleading requirements for surviving that evaluation.

The Sixth Circuit's rules violate the federal rules in another way as well, by prohibiting prisoners from curing a pleading defect related to the court's heightened requirements for pleading exhaustion. *See* Fed. R. Civ. P. 15(a); 6 Charles Alan Wright, et al., *Federal Practice and Procedure* § 1474 (2d ed. 1990) ("Perhaps the most common use of Rule 15(a) is by a party seeking to amend in order to cure a defective pleading.").[4] Thus, the Sixth

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[4] The only authority relied upon by the court of appeals in enforcing the "no amendment" rule in *Baxter* was *McGore v. Wrigglesworth*, 114 F.3d 601, 612 (6th Cir. 1997), which held without explanation that 28 U.S.C. § 1915(e)(2) prohibited district courts from allowing prisoner plaintiffs to amend their complaints to cure substantive deficiencies in the complaint. It appears that the court has assumed that the authority to dismiss a complaint sua sponte carries with it a prohibition on allowing a plaintiff to fix defects. But the court provides no authority for this assumption and it is inconsistent with basic fairness and common sense. Where a plaintiff is provided no notice or opportunity to be heard before his complaint is subject to dismissal, it becomes more not less imperative to provide the plaintiff with a second chance. And again,

Circuit has forgotten what this Court made clear nearly 50 years ago: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep . . . may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

Generally, the Sixth Circuit's rules reflect not what the PLRA says, but what the court believes the statute *should* say. But courts may not invent requirements or limitations not included in the text of the statute, even if they believe that doing so is consistent with legislative intent. Congress enacts statutes, not purposes, and the Sixth Circuit's rules far outrun the statute it purports to apply.

B. The Sixth Circuit's Rules Are Contrary to the Purposes of the PLRA and Exhaustion in General

The purposes of the PLRA's exhaustion requirement can be essentially reduced to two: (1) reducing frivolous litigation; and (2) providing prison authorities with the opportunity to resolve problems prior to court intervention. *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002); *Booth v. Churner*, 532 U.S. 731, 737 (2001). The Sixth Circuit's rules do not further either of these goals and, in some respects, are likely to frustrate them.

1. Affording prison officials an opportunity to resolve problems internally

In *Woodford*, 126 S.Ct. at 2385, the Court emphasized that a primary goal of the PLRA is to give

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because this is such a fundamental change in the normal rules of procedure, one would expect that Congress would have made such a change explicit. Not surprisingly, no other circuit has adopted this view.

prison administrators "a fair and full opportunity" to consider the grievance. None of the Sixth Circuit's rules implicates this concern because they are all *judicial* creations, not "critical procedural rules" of the prison. *Id.* at 2386.

a. Naming all defendants

i. Neither Michigan's nor most states' grievance procedures require prisoners to name potential defendants in their grievances.

The most obvious reason why a "name all defendants" rule is inappropriate in this case is that the Michigan grievance procedures at issue did not require or even ask that the prisoners provide this information in their grievance. A command to exhaust administrative remedies cannot be read to require more than the remedy itself requires. Neither the Michigan policy nor the form provided anticipates that a prisoner will file a grievance "against" a particular individual. Rather, the policy instructs prisoners to limit the information provided "to the *issue* being grieved." J.A., Vol. I, at 148 (emphasis added). *See also* J.A., Vol. I, at 1, 9, 20 ("be brief and concise in describing your grievance issue").[5] This is consistent with the vast majority of other state policies, including Sixth Circuit states Ohio, Kentucky and Tennessee, as well as the Federal Bureau of Prisons,

[5] After the events relevant to this case, Michigan amended its policy to state, "[d]ates, times, places and names of all those involved in the issue being grieved are to be included" in the grievance. Michigan Dep't of Corr. Policy Dir. No. 03.02.130 (December 19, 2003). That revised policy is not at issue in this case. Even if it were, however, *amici* argue that it could not be enforced in these cases. *See discussion infra* at 44-45.

which also lack any requirement to identify potential defendants in a grievance.[6]

ii. Naming potential defendants is not necessary to give prison authorities a fair and full opportunity to consider the grievance.

The "name all defendants" rule fundamentally misses the point of PLRA exhaustion, which is to "afford[] *corrections officials* time and opportunity to address complaints internally before allowing the initiation of a federal case," *Porter*, 534 U.S. at 524-25 (emphasis added), or as the Court stated more recently, to "provide[] *prisons* with a fair opportunity to correct their own errors." *Woodford* 126 S.Ct. at 2387-88 (emphasis added). *Cf. Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (holding that federal habeas claims are exhausted if they were "fairly present[ed]" to state courts).

For this purpose, "it is not notice to individual actors that is important [in a grievance] but notice to the prison

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[6] *Amici* reviewed and collected grievance policies for nearly all states as well as the BOP. A complete list of all policies reviewed and links to the policies themselves are available at http://www.law.yale.edu/academics/williamswaltonjones.asp. Because prison and jail grievance policies sometimes are not published in a readily available form, and because in some jurisdictions they may be revised frequently, *amici* do not represent that these policies are the most current.

Generally, prison grievance procedures require only a short and plain statement of a prisoner's complaint. *See, e.g.*, Conn. Dep't of Corr. Admin. Dir. 9.6.10.C (March 5, 2003); Ind. Dep't of Corr. Policy No. 00-02-301 at 16 (December 1, 2005); R.I. Code R. 06 070 002 (B)(2) (2005); S.D. Dep't of Corr. Admin. Remedy for Inmates, 1.3.E.2 at 4 (August 22, 2005). Some policies explicitly instruct inmates to state their complaints briefly and avoid surplusage. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 7, § 701.16 (2005).

administration. The purpose of administrative exhaustion is not to protect the rights of officers, but to give prison officials a chance to resolve the complaint without judicial intervention." *Freeman v Berge*, No. 03-C-21-C, 2004 WL 1774737, at *3 (W.D. Wis. July 28, 2004); *see also Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004). Thus, so long as prisoners sufficiently identify the *problem* they are experiencing in their grievance, prison authorities will have a fair and full opportunity to act on the grievance.[7]

This view is supported by the fact, noted above, that most grievance procedures do not require prisoners to name staff members. If this information were as necessary as the Sixth Circuit suggests, prison policies would so prescribe. There are several good reasons why they do not.

First, the prisoner's identification of staff members is often beside the point, as when a grievance challenges a prison policy. For example, if a prisoner complains that letters from his family are being censored because they are written in a foreign language, and the basis for the censorship is a state-wide policy, *see Traini v. Michigan Dep't of Corr.*, No. S:04-CV-179, 2005 WL 2291214 (W.D. Mich. Sept. 20, 2005), whether or not the prisoner identifies the right policymakers will have no effect on the course of the investigation or consideration of the complaint. The same is true of many grievances challenging specific actions by prison staff.

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[7] *E.g., Johnson v. Johnson*, 385 F.3d 503, 517 (5th Cir. 2004) ("a grievance should be considered sufficient to the extent that the grievance gives officials a fair opportunity to address the *problem* that will later form the basis of the lawsuit") (emphasis added); *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004) ("inmates must provide enough information about the *conduct* of which they complain to allow prison officials to take appropriate responsive measures") (emphasis added); *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002) ("All the grievance need do is object intelligibly to some asserted *shortcoming*.") (emphasis added).

Thus, Petitioner Williams did not name in his grievance the officials he later sued, but he did clearly identify the relevant problem, as was conceded by the defendants in the district court. J.A., Vol. I, at 83. Williams grieved that he was not receiving adequate medical care for his pain. Not surprisingly, the grievance examiners never stated that they needed Williams to identify the health unit manager or warden, who were later named as defendants, in order to evaluate whether they believed Williams was receiving sufficient care. J.A., Vol. II, at 9, 15, 17.[8]

Second, prison officials will rarely rely on the prisoner's identification of responsible staff members even when it might be relevant. Prison officials are in a much better position than prisoners to identify correctly the staff members responsible for a particular act or omission. Thus, in Petitioner Walton's case, the Level I grievance examiner explained that Walton had named the wrong person in his grievance. J.A., Vol. II, at 66. Even if the Michigan procedures *did* require prisoners to name potential defendants in their grievances, where these defendants are identified during the grievance process, there is no sensible rationale for a district court to reject a complaint on the ground that the identities of those defendants were omitted from the grievance itself. *Spruill v. Gillis*, 372 F.3d 218, 234 (3d Cir. 2004) ("the prison can excuse an inmate's failure to [name someone in his grievance] by identifying the unidentified persons and acknowledging that they were fairly within the compass of the prisoner's grievance").[9]

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[8] For cases in which the court concluded that policy makers did not have to be named in the grievance, see *Brown v. Sikes*, 212 F.3d 1205, 1209 (11th Cir. 2000); *Hooks*, 2006 WL 565909, *6; *Harris v. Moore*, No. 2:04CV00073 AGF, 2005 WL 1876126, at *2 (E.D. Mo. Aug. 8, 2005); *Freeman*, 2004 WL 1774737, at *3.

[9] The court of appeals faulted Walton for failing to file a new grievance once he learned that other prison officials were involved. J.A., Vol. I, at 173. However, the court failed to point to any provision in the Michigan grievance procedures that would have directed Walton to take this

For obvious reasons, prison officials do not decide grievances based solely on the prisoner's characterization of who is responsible for the problem. Grievance policies overwhelmingly provide for investigation of prisoners' complaints.[10] In fact, the Virginia policy that *amici* reviewed states that the Level I Warden or Superintendant *response* should include "the facts (who, what, when, where, why)," emphasizing the role of corrections officials in factual investigations.[11] In responding to one grievance, the highest reviewing authority for the New York Department of Correctional Services stated that "the names of staff are *irrelevant*. Staff were easily identifiable at the time of incident." State of New York Department of Correctional Services, Inmate Grievance Program Central Office Review Committee, Grievance No. SHG-21161-04 (January 19, 2005) (emphasis added) ("New York Sample Grievance 2"), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp. The nearly universal provision for investigation reflects the reality that it is generally much easier for prison authorities to investigate than prisoners, as well as more appropriate for security reasons. *See Brown v. Sikes*, 212

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course of action. In fact, it is quite possible that a new grievance raising the same issue would have been rejected as duplicative, Michigan Dept of Corrections Policy Directive 03.02.130, at G.1 (Nov. 1, 2000), or untimely, *id.* at G.3. In any event, filing an entirely new grievance simply to name a new individual who had already been identified by the prison would be completely wasteful, accomplishing nothing but to slow down the process and create more paper. *Hooks*, 2006 WL 565909, at *5 ("requiring an inmate to file additional grievances concerning essentially the same facts whenever he discovers additional information would harm the efficiency and the finality of the grievance process").

[10] *See, e.g.*, Federal Bureau of Prisons Program Statement 1330.13(5)(a)(3) (Aug. 6, 2002); Rules of the Fla. Dep't of Corr. 33-103.006(6) (Feb. 9, 2005); Wis. Admin. Code DOC § 310.11 (Oct. 2005).

[11] Virginia Dep't of Corr., Procedure No. DOP 866, § 866-7.15(1) (November 20, 1998).

F.3d 1205, 1209 (11th Cir. 2000).[12] Further, a "name all potential defendants" rule could have significant adverse consequences for prison grievance systems. Encouraging prisoners to list on their grievances every corrections official and staff member whom they *might* ultimately wish to sue would result in grievances that were more complex and difficult to understand, reducing the efficiency of the system, and also reducing the actual notice function of the grievance system by burying the key information in a mass of speculative allegations included only from a perceived need to protect litigation options.

Worse, requiring prisoners to name names in all cases will serve to make grievance systems more adversarial. Many grievance policies expressly state that their purpose is to resolve problems, foster communication between prisoners and staff and reduce prisoner tension.[13] But a "name all defendants" rule threatens to turn a problem-solving process into a blame-fixing process, which

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[12] In the context of Title VII, which *does* require plaintiffs to name all potential defendants in the EEOC charge, courts similarly allow plaintiffs to sue defendants not named in the charge so long as they were identified during the EEOC investigation. *Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112, 1123 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982); *see also Long v. State of Florida*, 805 F.2d 1542, 1547 (11th Cir. 1986); *Givan v. Greyhound Lines, Inc.*, 616 F. Supp. 1223, 1227 (S.D. Ohio 1985).

[13] *See, e.g.*, Federal Bureau of Prisons Program Statement 1330.13, 11.b.3 (Aug. 6, 2002) (stating that purpose of grievance system is to "solve problems"); Ark. Dep't of Corr. Admin. Dir. 04-01 (III.F) (Feb. 1, 2004) (referring to grievance examiners as "problem-solv[ers]"); Del. Bureau of Prisons Procedure No. 4.4 (II) (May 15, 1998); Haw. Dep't of Public Safety Policy No. 493.12.03 (1.0) (April 3, 1992); Texas Dep't of Criminal Justice Offender Grievance Program pamphlet, *available at* www.tdcj.state.tx.us/publications/admin-rvw/publications-admin-rvw-offender-grievance.htm. Prison authorities affirmatively deny that the grievance system is adversarial in nature. *See, e.g.*, N.Y. Response from Central Office Review Committee to Grievance EL-26035-04 ("New York Sample Grievance 1") ("the grievance program is not intended to support an adversary process").

will likely encourage hostility between prisoners and staff and reduce the likelihood of fair consideration of prisoners' complaints. *Cf. Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985) (noting that prison disciplinary hearing officers "are under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee").[14]

The needlessness of requiring prisoners to name potential defendants in grievances is shown especially when, as in the present cases, prison authorities accept the grievance and resolve it on the merits. If it is the judgment of prison officials that the grievance provided sufficient notice, "the federal judiciary will not second-guess that action, for the grievance has served its function of alerting the state and inviting corrective action." *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004). *See also Spruill*, 372 F.3d at 234; *Ross*, 365 F.3d at 1186. Neither Williams' nor Walton's grievance was rejected at any level for failing to provide adequate notice or identify the individuals involved in the complaint.[15] Both were denied on the merits. Thus, any argument that Petitioners' claims should be rejected because they were not specific enough has been waived.

iii. Prison grievance systems are informal problem-solving systems and are not designed to serve as complete rehearsals for litigation.

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[14] As experts on prison management have recognized, "[O]ne of the relevant gauges of the effectiveness of a grievance system is the extent to which the participants in the system regard and treat it as 'adversarial.' . . . [T]he more 'adversarial' the system is or is perceived to be, the less likely it is to be or to be perceived as effective." Vincent M. Nathan, Evaluation of the Inmate Grievance System, Ohio Department of Rehabilitation and Correction (Feb. 13, 2001), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp.

[15] The rule requiring prisoners to name all potential defendants in their grievances is not at issue in Jones' case.

The Sixth Circuit's requirement that prisoners name all potential defendants in the first step of the grievance process incorrectly assumes that the grievance process is akin to litigation and accordingly should be subjected to all of its formal requirements. *E.g.*, *Curry*, 249 F.3d at 505 (faulting prisoner for failing to recognize that claim against different defendant was based on separate legal theory).[16] Prison grievance procedures uniformly omit requirements to include legal theories in the grievance, and those reviewing the grievance are unlikely to be trained to assess legal issues anyway.[17] Most procedurals are informal and include few of the protections found in litigation. *Cf. Cleavinger*, 474 U.S. at 206 (noting that prison hearings often lack "procedural safeguards" of more formal proceedings). They also lack most other features normally associated with litigation, such as discovery, a hearing and presentation of

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[16] Even if it were appropriate to impose litigation-style requirements on grievances, the Sixth Circuit's rules go beyond even those. Although plaintiffs are generally required to name defendants in their complaints, "when the substance of a *pro se* civil rights complaint indicates the existence of claims against individual officials not specifically named in the caption of the complaint, the district court must provide the plaintiff with an opportunity to amend the complaint" and assist the plaintiff in identifying the proper parties if necessary. *Donald v. Cook County Sheriff's Dep't*, 95 F.3d 548, 555 n.3 (7th Cir. 1996) (citing cases from Fourth, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits); *see also Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 390 n.2 (1971) (noting district court's order to have complaint served upon agents described in complaint because plaintiff failed to name them). Even more generally, under Fed. R. Civ. P. 15, defendants may be added and dismissed from a complaint as discovery reveals more about the facts of the case.

[17] Commonwealth of Massachusetts, Governor's Commission on Corrections Reform, *Strengthening Public Safety, Increasing Accountability, and Instituting Fiscal Responsibility in the Department of Correction*, at 58 (June 30, 2004), *available at* http://www.mass.gov/Eeops/docs/eops/GovCommission_Corrections_Reform.pdf at 58 ("grievance coordinators have little or no training in due process, mediation or conflict resolution") [hereinafter Massachusetts Report].

evidence. In some cases, there is not even a guarantee that the grievance will be reviewed by someone other than the person about whom the prisoner is complaining.[18]

In the context of administrative law, content requirements for exhaustion in part "depen[d] on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims v. Apfel*, 530 U.S. 103, 109 (2000) (plurality). Other courts have recognized that where a proceeding is non-adversarial, the decision maker has an obligation to flesh out the facts. *Shaw v. Chater*, 221 F.3d 126, 134 (2d Cir. 2000) (stating that ALJ must "affirmatively develop the record in light of the essentially non-adversarial nature of" proceeding) (internal quotations and brackets omitted).

b. Pleading with particularity and total exhaustion

Making prisoners plead exhaustion with particularity in court does not enhance the prison grievance process, which is over by the time suit is filed. Rather, the sole justification for this rule has been as a judicial management tool.

In *Jones Bey*, the court stated, "In the PLRA context, a total exhaustion rule would encourage prisoners to make full use of inmate grievance procedures and thus give prison officials the opportunity to resolve prisoner complaints." 407 F.3d at 807 (*quoting Ross*, 365 F.3d at 1190); *see also id.* at 808 ("[S]tate prison systems have a[n] . . . interest in resolving cases involving their own institutions.") The Sixth Circuit has conflated the rationales of exhaustion

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[18] *See* Massachusetts Report at 58 ("grievance coordinators regularly investigate complaints against their peers, superiors and themselves"); Cal. Code of Regs., tit. 15, §3084.5(e)(1) (December 31, 2004) ("institution heads and regional parole administrators" may "reevaluat[e] their own decisions" and "shall respond to appeals filed against them personally").

generally and a total exhaustion rule. The question is not whether prisons have an interest in resolving problems on their own—no one disputes this—but whether a total exhaustion rule furthers this interest in any significant way. Whatever interest the prison has in encouraging prisoners to use the grievance process is already protected by a rule requiring courts to dismiss those claims that the prison was not given the opportunity to review.

2. Reducing the quantity and improving the quality of prisoner lawsuits

None of the Sixth Circuit's rules is targeted at frivolous litigation and *amici* are aware of no court that has argued seriously to the contrary. Rather, each of them is more likely to present a "trap [for] the unwary *pro se* prisoner," *Slack v. McDaniel*, 529 U.S. 473, 487 (2000) (internal quotations omitted), without regard to potential merit.

Although some courts have suggested that the total exhaustion requirement deters frivolous suits and improves the quality of litigation by creating an administrative record, none has actually explained how the requirement furthers these goals. *See, e.g., Jones Bey*, 407 F.3d at 807; *Smeltzer v. Hook*, 235 F. Supp. 2d 736, 744-45 (W.D. Mich. 2002). Even if one assumes that exhaustion documents do provide helpful information generally, or that exhaustion helps to weed out claims without merit, these interests are already served if courts consider only claims that have been fully exhausted and have generated whatever records the grievance process provides.[19]

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[19] As a more general matter, the Court should be wary of any unsupported claims that documents generated during the grievance process provide any significant benefit during litigation. *See Jones Bey*, 407 F.3d at 813 (Clay, J., concurring in part and dissenting in part). Even a cursory glance at the grievance records and forms collected by *amici* demonstrates that there is little in them that would aid a court.

The Court in *Woodford* expressed concern that prisoners, especially those with frivolous or bad faith claims, may try to deliberately flout procedural requirements, perhaps so that they can avoid substantive review of their grievance and conceal its deficiencies. *Woodford*, 126 S.Ct. at 2385 & n.1. This concern, however, has no application to any of the three rules at issue in this case. Regardless whether a prisoner is required to name defendants in his grievances, plead exhaustion with specificity or be subject to a total exhaustion rule, he will still have to fully exhaust each of his claims before a court will consider them on the merits.

a. Naming all defendants

There is no benefit for prisoners to gain in purposely omitting information about staff who might later be subjects of a lawsuit. In fact, a prisoner who is acting simply out of malice against a particular officer, *see Woodford*, 126 S.Ct at 2385 n.1, is *more* likely to specifically identify that officer, if only to request that he or she be disciplined. In contrast, a prisoner with a legitimate concern that he simply wants resolved will be more likely to complain about the problem itself rather than apportion blame to staff members.

Even if a prisoner were purposely trying to suppress the identity of an officer he intended to sue later, this would

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The average grievance "record" consists of no more than a few pages, and responses to even very serious grievances may be no more than a few words. *See, e.g.*, Connecticut Grievance No. M1410378 ("Connecticut Sample Grievance 3") (prisoner complained that he had not received adequate mental health treatment; one sentence Level 2 response states: "Adequate mental health care is provided to all inmates at NCI."); Texas Grievance No. 20011307 2 (prisoner complained that he was being continually sexual assaulted by other prisoners; responses at Level 1 and Level 2 were each 2 sentences, stating that prisoner had "insufficient evidence"). For several other sample grievances and responses, *see* http://www.law.yale.edu/academics/williamswaltonjones.asp.

get him nowhere. If he provided enough information in his grievance to identify the problem, investigation conducted by the prison administration would reveal who was involved. *See supra* at 12-13. If he failed to provide sufficient notice of the problem, the grievance would either be rejected by the prison authorities or else later by the court, because all courts at a minimum require prisoners to provide fair notice of the problem before presenting the claim in court.

b. Total exhaustion

The magistrate judge in *Walton* stated that without a total exhaustion requirement, "there would be nothing to deter prisoners from raising unexhausted claims indiscriminately." J.A., Vol. I, at 161-62, (quoting *Smeltzer*, 235 F. Supp. 2d at 745). This statement is simply incorrect. Prisoners have full incentive to exhaust all claims, even without a total exhaustion rule, because in either case a prisoner will be barred from having his unexhausted claims heard on the merits. Prisoners gain nothing by filing unexhausted claims that will inevitably be dismissed.

Further, any disincentive created by a total exhaustion requirement is theoretical. As will be discussed further *infra* at 26-28, the logic adopted by the magistrate judge assumes that a *pro se* prisoner will generally have the *ability* to determine on his own which claims are exhausted and which are not when he is considering whether to include a particular claim in his lawsuit. Such an assumption is highly implausible when one considers that even trained lawyers are often stymied by the enormous body of case law that has developed around the question of what does and does not constitute adequate exhaustion. *See Blackmon v. Crawford*, 305 F. Supp. 2d 1174, 1180 (D. Nev. 2004) ("such incentives will have little effect because many prisoners do not understand the exhaustion rule in the first place.").

c. Pleading with particularity

The Sixth Circuit has suggested that putting the burden on prisoners and requiring them to plead exhaustion with specificity will prevent them from manipulating liberal pleading standards to avoid early dismissal of their unexhausted claims. *Baxter*, 305 F.3d at 490 ("Courts would be unable to screen cases effectively if plaintiffs were able, through ambiguous pleading, to avoid dismissal of claims on which relief could not be granted."); *see also Knuckles El*, 215 F.3d at 642 (stating that pleading requirement is necessary so that district courts do "not have to hold time-consuming evidentiary hearings" on exhaustion).

There are several responses to this. First, the majority of circuits have not adopted the Sixth Circuit's pleading requirements and there is no indication that they are unable to screen cases effectively.

Second, if the justification for imposing heightened pleading requirements is simply that it makes screening easier for courts, then there is no principled reason for limiting these requirements to exhaustion. Of course, courts in the Sixth Circuit screen prisoner complaints not just for evaluating compliance with the exhaustion requirement, but also to determine whether they have stated a violation of federal law. Under the Sixth Circuit's logic, prisoners should have the burden to anticipate all possible affirmative defenses in their complaint and be required to plead *all* allegations with particularity, so as to better enable district courts to weed out meritless claims. However, no court has suggested that the PLRA imposes such a burden.

Third, courts have no authority to impose heightened pleading standards simply because they believe it will help to weed out frivolous claims, *Swierkiewicz*, 534 U.S. at 514-15, even in the context of prisoner litigation. *Crawford El v. Britton*, 523 U.S. 574, 585 (1998). In *Crawford El*, the

Court acknowledged arguments in favor of heightened pleading and proof requirements where public officials' intent was at issue. Nevertheless, the Court concluded that it "would stray far from the traditional limits on judicial authority" to change standards of pleading and proof on the basis of courts' policy concerns alone. *Id.* at 594. Instead, "the authority to propose those far-reaching solutions lies with the Legislative Branch, not with" the Court. *Id.* at 601 (Kennedy, J., concurring).

It might cynically be argued that one of Congress' purposes was to reduce the amount of prison litigation generally, without regard to whether or not claims have merit. Such a claim is belied by the PLRA's legislative history,[20] and is inconsistent with the holdings of this Court. *Woodford*, 126 S.Ct. at 2388 (recognizing that PLRA reduces non-frivolous prisoner filings only "because some prisoners are successful in the administrative process, and others are persuaded by the proceedings not to file an action in federal court"). Further, as argued in Part III, if the PLRA were simply an expression of ill-will against prisoners or an attempt to deny prisoners' right to access the courts, it would not survive even the least demanding constitutional scrutiny. *See id.* at 2404 (Stevens, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 634 (1996); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) (joint opinion) (stating that purpose of law is valid only if it is "one not designed to strike at the [constitutional] right itself"). Yet the devastating effects of the Sixth Circuit rules on prisoner

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[20] For example, Representative Canady stated, "These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit." 141 Cong. Rec. H1472, *1480 (discussing exhaustion, screening, and filing fee provisions of PLRA). Senator Hatch stated: "Indeed, I do not want to prevent inmates from raising legitimate claims." 141 Cong. Rec. S14611, *14626 (introducing an amendment "virtually identical" to the PLRA).

claims, completely unrelated to any assessment of their merits, *see infra* at 35-37, are indistinguishable from those of a statute purposefully crafted to keep a disfavored group's meritorious claims of violation of Federal rights out of court. Such rules cannot be tolerated in our constitutional order and should be overturned.

II. THE SIXTH CIRCUIT'S RULES HAVE CLOSED THE COURTHOUSE DOORS FOR PRISONERS

Each of the Sixth Circuit's three rules guarantees that many prisoners will never receive a ruling on the merits of their claims. When these rules are combined, the effect is devastating, leading to dismissal of nearly all prisoner complaints at screening.

A. The Sixth Circuit's "Pleading with Particularity" Requirement Is Unjustifiably Burdensome and for Many Prisoners an Insurmountable Obstacle

The Sixth Circuit's rule assessing exhaustion solely on the basis of the complaint is unrealistic and unfair, leading to many dismissals of potentially meritorious claims, as in the present cases. In *Jones*, for example, where the plaintiff alleged that he was assigned work that aggravated his medical condition, he made a good faith attempt to demonstrate in his complaint that he had exhausted his administrative remedies by alleging he had filed Step I, II and III grievances with respect to "each instant in which Plaintiff is alleging in this Complaint." J.A., Vol. I, at 8-9. He later provided his grievances to the court and the defendants conceded that that he had exhausted some of his claims. J.A. Vol. I, at 28-29. Nevertheless, both the district court and the court of appeals concluded that it was irrelevant whether the plaintiff actually had exhausted; all that mattered under *Knuckles El*

and *Baxter* was that he had failed to sufficiently allege it in his initial complaint, which, under Sixth Circuit rules, he was forbidden to amend to cure the defect. This reasoning is so remote from the language and purpose of § 1997e(a) as to lack any rational basis.

The Sixth Circuit rule is unfair not only because it fails to respect the leniency prescribed by this Court for *pro se* litigants, *see Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), but also because it imposes a pleading requirement much more demanding than is imposed on any other category of litigant. Indeed, the Sixth Circuit's requirements are so far out of line with what is required by ordinary pleading rules that even prisoners who diligently study the Rules will not know that they were required to satisfy the particularity requirement until their complaint has already been dismissed.

Even for prisoners who know the Sixth Circuit rules, it is often not as easy as it might appear to comply with this requirement. The slightest misstep can lead to dismissal. *See Rand v. Antonini*, No. Civ.A 05-CV-70969, 2005 WL 3163390 (E.D. Mich. Nov. 28, 2005) (dismissing entire action because plaintiff had failed to attach one Step I response to his complaint, even though he attached appeal responses and defendants admitted he had "grieved through Step III"). Further, courts imposing this rule have assumed without explanation that prisoners will have better access to exhaustion records than prison officials. *Steele*, 355 F.3d at 1210. But this assumption is unjustified. Some facilities do not provide prisoners with copies of their grievances, *see* Letter from Wyoming Assistant Attorney General to ACLU of Wyoming (Jan. 26, 2006) ("AG Letter"), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp, while prison officials generally maintain these records in their own files. Even if a prisoner is provided with a copy initially, this does not mean that she will get to keep it. By the time the prisoners are ready to file complaints, they may have lost possession of the grievances as a result of

limitations on property, a unit transfer or a cell search during which grievances may have been confiscated or destroyed.[21] The Sixth Circuit's pleading and documentation rule encourages policies and practices that make it difficult for prisoners to retain their grievances.

Finally, in many cases, the question whether exhaustion is complete or even required is not one that can be resolved easily on the basis of the complaint alone—especially a *pro se* complaint that the court will not allow to be amended. As Justice Breyer recognized in *Woodford*, 126 S.Ct. at 2393, there are many circumstances where a prisoner does not complete all the steps of a grievance process but courts nevertheless find that she had exhausted all available remedies. Thus, whether a prisoner adequately exhausted will be contingent on the particular facts of each case, which may be quite complicated. Prisoners will often have neither the knowledge nor the ability to adequately explain details in a complaint with sufficient particularity to show definitively that the circumstances in their case justify an exception to the rule. *See Bauer v. Dunn*, No. Civ.A.1:05-CV-P22-R, 2005 WL 2077339 (W.D. Ky. Aug. 29, 2005) (dismissing for non-exhaustion complaint by prisoner alleging sexual assault even though documents attached to complaint suggested that she may not have grieved out of legitimate fear for her safety). Because of these complexities, it is generally more appropriate to decide the issue of exhaustion after the facts have been more fully

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[21] Case law and *amici*'s own experience demonstrate that one of the most common complaints among prisoners is that officers confiscated necessary legal materials during a cell search, including grievances needed to show exhaustion. *See, e.g., Jacobs v. Beard*, 172 F. App'x 452, 455 (3d Cir. 2006); *Caico v. McTernan*, 156 F. App'x 990, 990 (9th Cir. 2005); *Chappell v. McCargar*, 152 F. App'x 571, 572 (9th Cir. 2005); *Walker v. Page*, 66 F. App'x 52, 53-54 (7th Cir. 2003); *Hunter v. Welborn*, 52 F. App'x 277, 278 (7th Cir. 2002); *Bell v. Johnson*, 308 F.3d 594, 597-98 (6th Cir. 2002); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001); *Penrod v. Zavaras*, 94 F.3d 1399, 1404 (10th Cir. 1996).

developed. *See Ortiz*, 380 F.3d at 659; *Steele*, 355 F.3d at 1211. *Cf. Jacobs v. City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring) ("Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground for dismissal . . . and when defendants do assert immunity it is essential to consider facts in addition to those in the complaint.")

The unfairness of the Sixth Circuit's pleading rule is compounded by its "no amendment" rule, which is to *amici*'s knowledge unique in denying any litigant, much less litigants who are almost all *pro se*, the benefits of Rule 15(a)'s policy of liberal amendment. Every other court to consider the question has rejected that view.[22]

B. A Total Exhaustion Rule Imposes an Unduly Harsh Penalty for Prisoners' Ignorance of Complex Legal Issues

It is the total exhaustion rule that has had the most pernicious effect on prisoners' ability to seek relief in federal court, for it means that one small mistake can cost a prisoner his entire lawsuit. For example, in *Edmonds v. Payne*, No. 3:04 CV P589 C, 2005 WL 2287006, *4 (W.D. Ky. Sep. 16, 2005), a prisoner sued several correctional officials, mostly for claims relating to failure to treat his Hepatitis C. The court found that the "plaintiff ha[d] availed

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[22] *See Brown v. Johnson*, 387 F.3d 1344, 1348-49 (11th Cir. 2004); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 109-14 (3d Cir. 2002); *Shane v. Fauver*, 213 F.3d 113, 117 (3d Cir. 2000); *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795-96 (2d Cir. 1999). These cases do not directly address exhaustion; they address the ability of plaintiffs to amend their complaints when they are found deficient at initial screening. The Sixth Circuit's contrary holding about the screening process is the basis for its "no amendment" policy concerning exhaustion defects as well as other deficiencies in prisoner complaints. *See McGore*, 114 F.3d at 612, *cited in Baxter*, 305 F.3d at 488-89.

himself of the grievance process on many of his claims," but noted that he had failed to specifically grieve one of the defendants' alleged interference with his treatment. *Id.* at *5. Although the plaintiff explained that he was unable to grieve this claim because he was transferred to another facility, the court faulted him for failing to grieve once he returned to the previous facility, even if the grievance would have been untimely at that point. *Id.* Thus, Edmonds was denied a decision on the merits for his entire case because he failed to realize that a court would expect him to file a grievance that would most likely be rejected as untimely.

1. Prisoners cannot reliably predict whether courts will find their claims to be exhausted.

As noted *supra* at 19, the total exhaustion rule is claimed to deter prisoners from including unexhausted claims in their lawsuits. But as the above example shows, this logic assumes incorrectly that even the most conscientious prisoner can reliably determine in advance which of his claims a court will find to be exhausted.

Since its enactment, the PLRA has generated vast amounts of case law, particularly regarding the exhaustion requirement, much of it contradictory, ambiguous or turning on idiosyncratic factual distinctions. *See* John Boston, The Prison Litigation Reform Act, 15-137 (Feb. 27, 2006), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp. "Indeed, the law on the narrow subject of the PLRA's exhaustion requirements continues to evolve month by month." *McCoy v. Goord*, 255 F. Supp. 2d 233, 240 (S.D.N.Y. 2003) (footnotes, quotations and brackets omitted), *cited in Steele*, 355 F.3d at 1207 n.1.

A Sixth Circuit prisoner considering litigation may face numerous questions that he must answer without the assistance of counsel, on penalty of dismissal for the

slightest mistake. For example, will he satisfy § 1997e(a) if he:

(a) filed suit after failing to receive a response to one of his grievances because the grievance procedures did not inform him what to do in such a case?[23]

(b) reasonably believed that the grievance policy did not allow or require the issue to be exhausted?[24]

(c) failed to complete the grievance process but circumstances justifying estoppel against the defendants are present?[25]

(d) did not appeal the grievance because it was resolved completely in his favor[26] or he was promised some relief, but not necessarily everything that the prison could have provided?[27]

(e) completed the exhaustion process for one grievance arising out of an ongoing problem (such as medical treatment for a particular condition or repeated sexual assaults), but he did not file new grievances after new but related instances occurred?[28]

(f) had complained about the same conduct in a disciplinary appeal but did not file a separate grievance on the issue?[29]

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[23] *Compare Dole v. Chandler*, 438 F.3d 804, 809-10 (7th Cir. 2006) (yes), *with Daily v. First Correctional Medical*, No. Civ.A. 03-923-JJF, 2006 WL 1517767, at *2 (D. Del. May 30, 2006) (no).

[24] *Compare Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004) (yes), *with Steele*, 355 F.3d at 1214 (no).

[25] *Compare Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004) (yes), *with Rutherford v. Cabiling*, No. Civ. 00-CV-2444REBPAC, 2005 WL 2240355, at *3 (D. Colo. Sept. 14, 2005) (no).

[26] *Compare Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005) (yes), *with Williamson v. Wexford Health Sources, Inc.*, 131 F. App'x. 888, 890 (3d Cir. 2005) (no).

[27] *Compare Thornton v. Snyder*, 428 F.3d 690, 696-97 (7th Cir. 2005) (yes), *with Braham v. Clancy*, 425 F.3d 177, 182-83 (2d Cir. 2005) (no).

[28] *Compare Johnson*, 385 F.3d at 521 (yes), *with Kane v. Winn*, 319 F. Supp. 2d 162, 223 (D. Mass. 2004) (no).

[29] *Compare Mitchell v. Horn*, 318 F.3d 523, 531 (3d Cir. 2003) (yes), *with Hattie v. Hallock*, 8 F. Supp. 2d 685, 689 (N.D. Ohio 1998) (no).

(g) did not comply with all technical requirements of the grievance system but complied substantially or made reasonable efforts to comply?[30]
(h) failed to exhaust because his ability to do so was impaired by mental illness, illiteracy, age or disability?[31]
(i) failed to file a grievance because he was threatened with retaliation?[32]
(j) failed to file a grievance or appeal based on information he relied on from prison officials?[33]

Even the courts do not agree on these matters, a decade after the statute's enactment. If questions regarding exhaustion are even "challenging for the courts to decide," *Ortiz*, 380 F.3d at 659, how can *pro se* prisoners reasonably be expected to predict how a particular judge might rule?

Thus, if a total exhaustion rule has any effect on prisoners' filing behavior, it will not be to deter filing claims they know are unexhausted. Rather, more likely it will chill prisoners from filing claims that are arguably but not clearly exhausted. Similarly, it will provide an enormous incentive to prison authorities to make the exhaustion process as confusing and difficult as possible, because they will know that any slight misstep could lead to dismissal of all a prisoner's potential claims.

2. Other harsh consequences of the total exhaustion rule

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[30] *Compare Nyhuis v. Reno*, 204 F.3d 65, 77-78 (3d Cir. 2000) (yes), *with Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003) (no).

[31] *Compare Gonzalez v. Lantz*, No. 303CV2264SRUWIG, 2005 WL 1711968, at *3 (D. Conn. July 20, 2005) (yes), *with Williams v. Kennedy*, No. C.A. C-05-411, 2006 WL 18314, at *2 (S.D. Tex. Jan. 4, 2006) (no).

[32] *Compare Osborne v. Coleman*, No. 2:00CV801, 2002 WL 32818913, at *4 (E.D. Va. Sept. 9, 2002) (yes), *with Broom v. Engler*, No. 4:05-CV-123, 2005 WL 3454657, at *3 (W.D. Mich. Dec 16, 2005) (no).

[33] *Willis v. Smith*, No. C04-4012-MWB, 2005 WL 550528 at *13 (N.D. Iowa Feb. 28, 2005) (yes), *Mendez v. Herring*, No. 05-1690 PHX/JAT, 2005 WL 3273555, at *2 (D. Ariz. Nov. 29, 2005) (no).

The Sixth Circuit's total exhaustion rule undermines this Court's command to construe complaints liberally, which requires district courts to determine whether any facts alleged in a complaint state a claim under any legal theory. *See Conley*, 355 U.S. at 45-46; 5B Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure*, § 1357, at 676 (3d ed. 2004). Of course, the intention of this rule is to better insure that complaints are not dismissed simply for technical deficiencies or a plaintiff's unfamiliarity with the law. The Sixth Circuit, however, has turned the rule on its head. For if a court construes a complaint liberally and mistakenly construes as a claim allegations that are present merely for background or context, it will inevitably lead to dismissal of the entire lawsuit for failure to adequately allege exhaustion—a prisoner will not allege he filed grievances for a "claim" he did not intend to assert.[34]

A prisoner affected by the total exhaustion rule will also have to pay an additional filing fee, which is currently $350, to pursue claims that were properly exhausted in the first place.[35] It scarcely needs to be noted that the vast majority of prisoners have great difficulty paying one filing fee, let alone multiple fees for each suit that is dismissed for a procedural error. If a prisoner tries to complete the grievance process for any unexhausted claim, she may be

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[34] Thus, in *Nwozuzu v. Rummels*, No. CIV S-05-1938 MCE DAD P, 2006 WL 1897120 (E.D. Cal. July 11, 2006), the plaintiff complained of numerous events and conditions, many of which he had not exhausted, but he explained in response to a motion to dismiss that they were not separate claims but constituted factual support for the claims that were exhausted. Under Sixth Circuit rules, he would not have had an opportunity to provide this explanation, and his complaint would likely have been dismissed with no opportunity to amend and clarify it.

[35] Even prisoners who are granted leave to proceed *in forma pauperis* must still pay the entire filing fee in increments. 28 U.S.C. § 1915(b).

unable to return to court until after the statute of limitations has expired.[36]

Of course, after *Woodford*, there will generally be little point for prisoners to attempt to complete the grievance process, since by then any new grievance will be untimely and the claims will be barred from federal court. Although prison authorities may consider an untimely grievance on the merits, common sense and *amici*'s own collective experience suggest that this is the rare exception rather than the rule. Prison officials often deny extensions even under very extenuating circumstances. *See, e.g., Days v. Johnson*, 322 F.3d 863, 865 (5th Cir. 2003) (describing prison officials' refusal to grant good cause extension where prisoner was unable to fill out grievance form because he broke his writing hand).[37]

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[36] Thus, in practice, the Sixth Circuit's total exhaustion rule is much harsher than the one this Court has applied in the context of habeas corpus. A number of courts have explained why habeas provides an inappropriate analogy for determining whether a total exhaustion rule should apply to civil rights claims. *See, e.g., Lira v. Herrera*, 427 F.3d 1164, 1174-75 (9th Cir. 2005); *Ortiz*, 380 F.3d at 660-62. Even if habeas did provide an appropriate model, however, there are a number of factors in the context of habeas cases that significantly soften the impact of a total exhaustion rule. Most importantly, habeas petitioners have the option of deleting any unexhausted claims from their petition in lieu of filing a new one. *Rose v. Lundy*, 455 U.S. 508, 520 (1982). As one court has recognized, there is little practical difference between rejecting a total exhaustion rule outright and allowing the plaintiff to file an amended complaint. *Beltran v. O'Mara*, 405 F. Supp. 2d 140, 158 (D.N.H. 2005). Additionally, district courts are now empowered, even required in some circumstances, to stay a partially exhausted case rather than dismiss it, and hold the case in abeyance while the prisoner finishes exhausting. *Rhines v. Weber*, 544 U.S. 269 (2005). The Sixth Circuit has not recognized either one of these alternatives to complete dismissal in cases challenging prison conditions. *Freeman v. Francis*, 196 F.3d 641 (6th Cir. 1999) (holding that prisoners "may not exhaust administrative remedies during the pendency of a federal suit").

[37] Moreover, when a prisoner is returning to the grievance process after his claim is dismissed under the total exhaustion rule, officials will have an additional incentive to reject the grievance as untimely, because they

C. Prisoners are unable to identify all potential defendants within the short grievance deadlines.

In many cases, prisoners simply cannot comply with a requirement to name all potential defendants in the initial grievance. Prisoners often do not know the identities or even titles of staff involved in an alleged deprivation. A prisoner could be personally mistreated by a staff member who was hiding his identity, or whom the prisoner had never seen before. *See, e.g., Stackhouse v. Maricopa County*, No. CV 05-0028-PHX-DGC(MEA), 2006 WL 2037939, at *2 (D. Ariz. July 19, 2006). More often, because prisoners are so limited in their freedom of movement and ability to obtain information, they may experience a deprivation without knowing its source. Importantly, grievance systems generally lack a mechanism for enabling prisoners to reliably to identify potential defendants, even if one wanted to do so. They do not contain provisions for discovery, and *amici* did not find any policies that permitted prisoners to "amend" a grievance so that they could add a name.[38] When prisoners attempt to identify the responsible person, they simply have to guess, as in Walton's case, where he was told by the grievance examiner that he was mistaken

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will know that the prisoner intends to take this claim to court and they now have the authority to prevent him from doing so. Reports to *amici* from prisoners in Illinois suggest that has become standard operating procedure since the Seventh Circuit decided *Riccardo*, 375 F.3d 521, in which the court held that prison officials waive the untimeliness of a grievance if they consider it on the merits. According to prisoners held in Illinois, since that decision, the department of corrections no longer makes exceptions for late grievances.

[38] Of course, prisoners in many states would likely be permitted to withdraw their grievance and file a new one with additional information. However, because grievance deadlines can be as short as a few days, a prisoner risks having the new grievance rejected as untimely.

about the identity of the person who made the decision about which he was complaining.[39]

A requirement that prisoners learn identities of unknown potential defendants is particularly unrealistic in view of the short deadlines of many grievance systems. After *Woodford*, prisoner plaintiffs in the Sixth Circuit face a classic Catch-22. On the one hand, they must file their grievance within the time prescribed or face procedural default. But they must also be able to identify every person whom they may want to sue later. Few prisoners will be able to do this in such a short time, so they will have to choose between losing the right to sue potential defendants and continuing to investigate while taking the chance that their grievance will be rejected as untimely.

Most *lawyers* could not, on a few days' or weeks' notice and without discovery, identify all the defendants who might eventually turn out to be liable for the harm caused to a plaintiff as the result of a constitutional violation. But of course, lawyers may add new defendants as discovery reveals new facts, even after the statute of limitations has run if the plaintiff can satisfy Fed. R. Civ. P. 15(c)(3). In contrast, in the Sixth Circuit, the universe of potential defendants is frozen the day a prisoner files a Step I grievance.

Second, and closely related, a prisoner may simply be unaware that a particular official had any involvement in a constitutional violation. This will often be the case when the violation is a result of a widespread policy or practice.

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[39] *See also Brown*, 212 F.3d at 1208 (concluding that PLRA did not require prisoner to "provide information he does not have and cannot reasonably obtain"); *Sulton v. Wright*, 265 F. Supp. 2d 292, 298 (S.D.N.Y. 2003) (noting *pro se* prisoners' difficulty in identifying defendants); *Lira v. Dir. of Corr. of State of California*, No. C00-905 SI (PR), 2002 WL 1034043, at *4 (N.D. Cal. May 17, 2002) ("[A]n inmate may not know all the names of the defendants until after he files a civil action and conducts discovery, in which case, he would have to dismiss his action and file anew under defendants' reasoning.").

In that circumstance, the prisoner may name the lower level official who was required to enforce the policy or practice, but he may have no basis for knowing who was ultimately responsible for the decision. The same is true when the misconduct of line staff has its roots in the defaults or tacit authorization of supervisors: a prisoner may not know the facts or appreciate the complexities of supervisory liability under 42 U.S.C § 1983 within the short time limit for filing a grievance. *Cf. Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (8th Cir. 2003) (holding that a prisoner who grieved about the officers who abused him, but did not raise in his grievance claims that their supervisor refused to take action against the officers, failed to train them and retaliated against him for his complaints, had not exhausted his claim against the supervisor).

The injustice of a rule that requires prisoners to name all potential defendants in their grievances is shown in *Broder v. Corr. Med. Servs., Inc.*, No. 03-CV-75106 (E.D. Mich. Sept. 22, 2004), in which the plaintiff filed a § 1983 action alleging that the defendants failed to timely diagnose and treat his throat cancer.[40] In his grievances, the plaintiff had identified at least 37 individual medical providers and officials, but when he filed his lawsuit, he also named the corporate entity responsible for providing medical care, Correctional Medical Services. Although there was no dispute that Broder had fully identified all of the problems he was experiencing in his grievances, the district court nevertheless dismissed CMS because it was not named separately in the grievances.[41]

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[40] This case is not available on Westlaw. However, *amici* have posted the decision at http://www.law.yale.edu/academics/williamswaltonjones.asp.

[41] *See also VanDiver v. Martin*, 304 F. Supp. 2d 934, 943-44 (E.D. Mich. 2004) (finding non-exhaustion on medical claims; although plaintiff had named individuals in complaint, court found that plaintiff had not sufficiently named corporate provider where his grievance said only that provider would be liable if his foot was amputated).

If this Court concludes that all defendants must be named in a grievance, it will severely impair prisoners' ability to pursue meritorious challenges to prison policies, since the decision makers are so often unseen by and unknown to affected prisoners. It is unrealistic to expect prisoners to be able to contemplate and investigate the decision-making hierarchy within a prison, much less figure it out, within the time prescribed by the rules, when they are simply trying to use the grievance system to get some relief. Also, prisoners cannot be expected to have mastered all the potential theories of personal involvement under § 1983 before filing their level one grievance. *See Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (discussing five theories of personal involvement under § 1983).

As noted *supra* at 8, there is clearly no basis to impose a "name all defendants" rule where the prison grievance system has addressed the merits of the complaint. There is particularly no basis for a court to impose such a requirement where the grievance system gave no notice to prisoners of any such requirement, as is the case here. *See Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment) (concluding that "agency's failure to notify claimants of an issue exhaustion requirement" was sufficient basis to reject such requirement). Further, if prison administrators accept the grievance and resolve it on the merits, the prisoner will have no way of knowing she did anything wrong until after her case is dismissed, when it is too late to cure the defect and most likely too late to file a new grievance. If the authorities believe they do not have enough information to adequately investigate the grievance, it is well within their authority to either ask the prisoner for more information or to explicitly reject the grievance and invite the prisoner to re-file. They should not be permitted to decide a grievance on the merits and then later assert in court that they actually needed more information. This would only invite prison officials to insert highly technical and confusing

requirements in their procedures to be invoked in case of litigation.

D. The Insidious Interaction of the Sixth Circuit's Rules

In his dissenting opinion in *Jones Bey*, 407 F.3d at 814, Judge Clay made a dire prediction: "In practice, the total exhaustion rule is not only likely to amount to a monetary penalty, it is also likely to be a convenient means for district courts to expediently close the courthouse door to *pro se* prisoner litigants, without proper regard for the merits of their claims or consideration of their status." Judge Clay's prediction has come true. The total exhaustion rule, in combination with the Sixth Circuit's requirements to plead exhaustion with specificity and name all potential defendants in the grievance, has all but eliminated prisoners' ability to obtain rulings on the merits of their claims.

Of the nearly 500 prisoner screening orders available on Westlaw from the Sixth Circuit since *Jones Bey* was decided, only eighteen allowed the prisoner to proceed.[42] Of these eighteen, eight involved cases in which *Jones Bey* required complete dismissal but the district court (Judge Richard Alan Enslen) refused to follow that case. In five more cases, the district court either ignored the total

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[42] *Amici* chose the date of the *Jones Bey* decision to begin tracking screening orders because, as of that date, all of the Sixth Circuit's rules at issue in this case were in effect. To generate this result, *amici* conducted the following Westlaw search on July 5, 2006, in the database FED6-ALL, which encompasses all district and appellate cases in the Sixth Circuit: PLRA "PRISON LITIGATION REFORM ACT" (28 /4 1915!) 1997E! & DA(AFTER 4/27/2005). (*Amici* included appellate cases for the purpose of evaluating whether any district court decisions were reversed on appeal.) *Amici* reviewed all results from this search, pulling from it all orders screening prisoner complaints under the PLRA. Excluded from the total were cases in which the court concluded that the prisoner had improperly filed the lawsuit under § 1983 instead of one of the habeas corpus statutes.

exhaustion rule or ignored the question of exhaustion altogether. Thus, in screening orders where the district court applied *Jones Bey*, *only five did not result in dismissal of the entire case*.[43] Of the cases dismissed, more than half were dismissed for the prisoner's failure to comply with one or more of the three rules at issue in this case. By comparison, in the Seventh Circuit, of 25 screening orders available on Westlaw for June 2006, 12 of them allowed the prisoner to proceed.

Thus, as Judge Clay feared, the courthouse door is now effectively closed for all but the savviest prisoners incarcerated in Ohio, Michigan, Tennessee and Kentucky. The Sixth Circuit has not adopted reasonable rules that improve the quality of litigation and help prison authorities solve problems. Instead it has imposed a series of "gotchas," to which nearly all prisoners have fallen victim. *Hooks*, 2006 WL 565909, at *5 ("The exhaustion requirement is a gatekeeper, not a 'gotcha' meant to trap unsophisticated prisoners who must navigate the administrative process *pro se*."). *See also Slack*, 529 U.S. at 487 (stating that exhaustion should not present a "trap" for "the unwary *pro se* prisoner").

This result should trouble anyone who believes that prisoners should retain an actual as opposed to theoretical ability to enforce their rights in federal court. It should also raise alarm for anyone who is concerned about prison

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[43] In three of those five cases, the court found that the plaintiff had not alleged completion of each step of the grievance process, but nevertheless allowed the case to proceed. *See Hahn v. Tarnow*, No. 5:06CV74, 2006 WL 4705128, at *2 n.4 (W.D. Mich. June 16, 2006) (finding that plaintiff failed to complete grievance process, but concluding that he had no available remedies because plaintiff alleged he was on "modified grievance access"); *Rayburn v. Sizemore*, No. Civ. A 605322DCR, 2005 WL 1593947 (E.D. Ky. July 6, 2005) (finding failure to exhaust but allowing case to proceed because complaint contained allegations suggesting estoppel); *Martin v. Sizemore*, No. Civ.A. 05-CV-1050KKC, 2005 WL 1491210 (E.D. Ky. June 22, 2005) (same).

security. It is hardly surprising that social scientists have found that a primary cause of violence is a feeling that peaceful methods of resolving disputes are not available. James Gilligan, *Violence* 112 (1996). If prisoners believe that they will not receive a hearing on their claims in court, this can increase a sense of injustice and frustration, creating a heightened risk for violent confrontations with both staff and other prisoners.

III. THE COURT MUST EVALUATE ANY EXHAUSTION REQUIREMENTS FOR CONSISTENCY WITH 42 U.S.C. § 1983 AND THE RIGHT OF ACCESS TO THE COURTS

A. The Court Must Interpret the PLRA So As Not to Conflict with § 1983 and the Right of Access to Courts

Although interests in reducing frivolous litigation and protecting agency autonomy are undoubtedly important, they are not the only interests to be considered in determining the validity of exhaustion requirements that are not found in the text of the PLRA itself.[44] The PLRA does not repeal 42 U.S.C. § 1983 as it applies to prisoners. As a result, where possible, the two statutes should be construed so as not to conflict. *Pittsburgh & Lake Erie R.R. Co. v. Ry. Labor Executives' Assoc.*, 491 U.S. 490, 510 (1989). Particularly where, as here, the PLRA is silent or at best ambiguous, courts must be mindful not to undermine the policies underlying § 1983 when considering burdens on prisoners' ability to bring and maintain lawsuits. *See*

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[44] Even in habeas cases, in which the exhaustion requirement implicates more strongly interests in comity and federalism, this Court has acknowledged that a prisoner's "interest in obtaining federal review of his claims" can outweigh "competing interests in finality and speedy resolution of federal petitions." *Rhines*, 544 U.S. at 278.

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 685 (1978) (stating that Congress intended § 1983 to provide "broad remedy" for violations of federal rights); *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (stating that purpose of § 1983 was "to interpose the federal courts between the States and the people").

The Court must also consider the right of access to the courts. "[T]he right to file a court action might be said to be [a prisoner's] remaining most 'fundamental political right, because preservative of all rights.'" *McCarthy v. Madigan*, 503 U.S. 140, 153 (1992) (*quoting Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)). That right guarantees prisoners that they will not be arbitrarily prevented from litigating a federal action, *see Ex parte Hull*, 312 U.S. 546, 549 (1941), and, further, that they will have "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." *Bounds v. Smith*, 430 U.S. 817, 825 (1977); *see also Lewis v. Casey*, 518 U.S. 343, 351 (1996). Courts have a duty to construe statutes narrowly so as to avoid potential conflicts with constitutional rights. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001). The Court should interpret the PLRA in a manner that is consistent with prisoners' constitutional right to court access.

Finally, when evaluating burdens on prisoners' court access, courts must also consider prisoners' status. Many are uneducated, illiterate and indigent. *See* U.S. Department of Education Office of Education and Research, *Literacy Behind Prison Walls: Profiles of the Adult Prison Population from the National Adult Literacy Survey* (1994). All but a lucky few are *pro se*, particularly during the grievance process. This Court and others have acknowledged various ways in which courts should accommodate *pro se* parties.[45] At a minimum, this means

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[45] *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (pleading); *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983) (re-opening case after default); *Madyun*

that courts should not impose procedural rules that are harsher than those required in cases that are usually handled by counsel, such as refusal to allow amendment to cure deficiencies, a requirement to plead exhaustion with specificity and an expectation that the prisoner will have fully developed theories of liability by the level one grievance deadline.

These principles suggest a standard already noted in *Woodford*, 126 S.Ct at 2392: prisoners are entitled to a "meaningful opportunity" to "raise meritorious grievances" and present their claims to a federal court. As demonstrated *supra* at 35-37, the Sixth Circuit's rules deprive prisoners of this opportunity. They are essentially arbitrary barriers to prisoners' exercising their right to access the courts and cannot be allowed to stand.

B. The Right of Access to Courts and § 1983 Limit Prison Authorities' Discretion in Imposing Grievance Requirements

The right of access to the courts and the policies underlying § 1983 are also relevant in considering the validity of procedural requirements imposed by prison officials. To reject the Sixth Circuit's rules, the Court need only recognize the principle implicit in *Woodford*, that if a prisoner follows all of the prison's procedures, she cannot later be denied access to the courthouse for failure to exhaust. However, to the extent the Court believes that Petitioners somehow failed to comply with any grievance procedures, it is important that the Court recognize that prison officials may not impose requirements that are

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v. Thompson, 657 F.2d 868, 876 (7th Cir. 1981) (instructions on summary judgment); *Gordon v. Leeke*, 574 F.2d 1147, 1152-53 (4th Cir. 1978) (amending complaint). In other words, courts should take into account whether a particular requirement is one "which an uncounseled inmate can be fairly required to satisfy." *Hooks*, 2006 WL 565909, at *5.

inconsistent with the right of access to courts or the policy underlying § 1983. *Johnson*, 385 F.3d at 517 n.8 ("a state could not make grievance rules that prevented the vindication of substantive rights"); *Spruill*, 372 F.3d at 235 ("Such measures, we reiterate, must be consistent with the Federal Constitution and the federal policy embodied in § 1997e(a) to be enforced as grounds for procedural default in a subsequent federal lawsuit."); *Strong*, 297 F.3d at 649 ("[N]o prison system may establish a requirement inconsistent with the federal policy underlying § 1983 and § 1997e(a)."). Again, at a minimum this means that prisoners must have "a meaningful opportunity" to exhaust their administrative remedies. *Woodford*, 126 S.Ct. at 2392. *Cf. James v. Kentucky*, 466 U.S. 341, 348 (1984) (holding that state procedural rules will not be enforced in habeas corpus if they do not rest on adequate grounds).[46]

One of the purposes of § 1983 was to protect the people from potential "prejudice, passion, neglect, [and] intolerance" of state actors. *Monroe v. Pape*, 365 U.S. 167, 180 (1961). Undoubtedly, there is always potential for abuse when a party must first seek relief from the same entity that she may later sue in court. *See Felder v. Casey*, 487 U.S. 131, 142 (1988). In the prison context, a future plaintiff may be required to submit her grievance to the same *person* that she believes violated her constitutional rights. *See, e.g.*, Utah Grievance No. 990859363 ("Utah Sample Grievance 2") (prisoner complained that officer refused to move him away from cell mate before he was assaulted; same officer that refused to move him decided his grievance). Under these circumstances, it becomes critically important to guard the right of access to the courts and

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[46] In *Woodford*, 126 S.Ct. at 2386 (emphasis added), the Court suggested that it was appropriate to evaluate the necessity and importance of prison exhaustion requirements when it noted that compliance with "*critical* procedural rules" was needed to ensure that prison officials have an adequate opportunity to consider the grievance.

ensure that prison officials are not using their complete control to immunize themselves from scrutiny. *See Campbell v. Chaves*, 402 F. Supp. 2d 1101, 1106 n.3 (D. Ariz. 2005) (noting danger that grievance systems might become "a series of stalling tactics, and dead-ends without resolution").

It is far from speculative to believe that prison authorities may try to manipulate exhaustion requirements to deprive a prisoner of his right of access to courts. With respect to "name the defendant" requirements, at least one state has already amended its grievance procedures to require this, but only after the Seventh Circuit allowed a prisoner's lawsuit to go forward because the then-current version of the Illinois procedures were silent on this issue. *Compare* Ill. Adm. Code tit. 20 § 504.810(b) (2005) *with* Ill. Adm. Code tit. 20 § 504.810 (1998), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp.[47]

More generally, there are any number of policies that appear calculated to keep prisoners' claims, however, legitimate, out of court. For example, Mississippi's grievance system provides many illustrations of the ways in which prison authorities may set "traps" preventing prisoners from suing: (1) the handbook provided to Mississippi prisoners explaining the grievance process omits information about the requirement to appeal and the applicable appeal deadlines;[48] (2) prisoners face denial of

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[47] In *Strong*, 297 F.3d 646, the court held that the required level of specificity in a grievance was controlled by the facility's grievance procedures.

[48] *Compare* Mississippi Dep't of Corr., Standard Operating Procedure 20-08-01, at 3 (July 1, 2003) (setting forth appeal process and deadlines for appeal including five-day limit for appeals from the step one response), *with* Mississippi Dep't of Corr., Inmate Handbook, 54-59 (Dec. 8, 2005) (omitting this information). All grievance materials cited in notes 50-55 and 58-60 are available at http://www.law.yale.edu/academics/williamswaltonjones.asp.

their grievance if they fail to use the magic words, "this is a request for [an] administrative remedy" on their grievance;[49] (3) Mississippi prisoners who submit even serious grievances may have to wait *years* before they receive even a boilerplate response;[50] (4) no matter how long they have been waiting for a response, prisoners may not have a second grievance considered unless they *withdraw* the first grievance, allowing officials to coerce prisoners into abandoning claims by simply refusing to decide them;[51] (5) if a prisoner seeks assistance from a lawyer during the grievance process, officials may simply reject the grievance;[52] (6) finally, and most egregiously, when prisoners complete the grievance process they receive a "certificate" from the administrator, informing them that they must "seek judicial review within 30 days of receipt of the Third Step Response," a blatant misrepresentation of the law, which has no doubt resulted in many Mississippi prisoners being misled into abandoning their claims.[53]

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[49] Mississippi Dep't of Corr., Inmate Handbook, at 55-56 (Dec. 8, 2005).

[50] One prisoner filed a grievance complaining of excessive cold in November 2000; he did not receive a First Step Response until March 2003. *See* Mississippi Grievance No. MSP-03-474 ("Mississippi Sample Grievance 4"). Another grievance filed in November 2000 complained of inadequate medical care; the first step response came in May 2003. Mississippi Grievance No. MSP-03-1313 ("Mississippi Sample Grievance 2"). *See also* Mississippi Grievance MSP-04-163 ("Mississippi Sample Grievance 3") (in May 2003 prisoner filed grievance complaining that housing conditions threatened his health and safety; first step response came in February 2004, stating only, "Your charges are unfounded").

[51] Mississippi Dep't of Corr., Standard Operating Procedure 20-08-01, at 2 (July 1, 2003); Letter from Legal Claim Adjudicator (Sept. 9, 2003) ("Mississippi Sample Grievance 5").

[52] *See* Memo from Legal Claims Adjudicator (Mar. 31, 2003) ("Mississippi Sample Grievance 6"). (refusing to process grievance when prisoner requested that response be forwarded to lawyer even though grievance rules did not list this as basis for rejection).

[53] *See* Certificate for Mississippi Grievance No. MSP-04-163 ("Mississippi Sample Grievance 3").

Within the Sixth Circuit, an expert appointed by the Ohio Department of Rehabilitation and Correction concluded that the grievance system there was "unduly complicated," that the handbook provided to the prisoners was not helpful, that many prisoners did not understand how to grieve properly and that there was an "unacceptably high" level of staff retaliation against prisoners for using the grievance process.[54] In Michigan there is a restriction called "modified access," under which some prisoners are prohibited from filing grievances for at least 90 days unless they first obtain permission from prison officials, a policy bearing an eerie resemblance to the one this Court struck down in *Ex Parte Hull*, 312 U.S. 546 (1941). *See* Michigan Dep't of Corrections Policy Directive 03.02.130, JJ-NN (December 19, 2003).

Other prisons, too, have adopted confusing or overly cumbersome procedures,[55] severely restrict permission to

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[54] Vincent M. Nathan, Evaluation of the Inmate Grievance System, Ohio Department of Rehabilitation and Correction, at 24, 28 (Feb. 13, 2001), *available at* http://www.law.yale.edu/academics/williamswaltonjones.asp. For example, the report notes: "[A]n inmate who is attempting to understand the time frames within which the grievant and others must operate under the grievance system must consult two departmental policies and at least two administrative rules on the subject. Even then, he is left with significant unanswered questions on the issue of time limits." *Id.* at 15-16. Also, in 1999 the Missouri Department of Corrections found that the Ohio State Penitentiary Inmate Handbook, in its section titled "Grievance Procedures," did not advise the prisoner that there is a time limit for filing grievances or that there was an appeal process. *See Brief for the ACLU as Amicus Curiae Supporting Respondent*, at 19, in *Booth v. Churner*, 532 U.S. 731 (2001), *available at* 2000 WL 1868111.

[55] *See* Massachusetts Report at 58 (concluding that procedures are "vague, ambiguous and discretionary"); *Brief for the ACLU as Amicus Curiae* in *Booth* at 19 (citing 1999 survey from Missouri Department of Corrections, which found that Washington state procedure was "very lengthy and very detailed. Certain issues are not always in one area in

file grievances,[56] failed to respond to grievances for long periods of time,[57] refused to process more than one grievance at a time,[58] and falsely represented in court that prisoners had failed to file grievances on certain claims.[59]

Even policies not purposely directed at limiting court access may impose burdens inconsistent with the Constitution and the policy of § 1983. For example, Michigan's new grievance policy, which asks (though does not necessarily require) prisoners to include names of potential defendants, could not be enforced in this case, even if it had been in effect when Petitioners grieved and even if the reviewing authorities had declined to consider the merits of the grievances. Because neither Williams nor Walton knew or could have reasonably known who the defendants were at the time they filed their grievances, a requirement to include this information would be an arbitrary denial of their right of access to the courts. *See Freeman*, 2004 WL

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the procedure, making it difficult to find" and that the Hawaii procedure was "difficult to follow").

[56] Letter from Warden of Dorchester County Detention Center to ACLU Cooperating Counsel (April 30, 2004) ("Dorchester County Policy"). The warden defended his practice on the ground that "[i]t makes no sense to fill my grievance form file with frivolous complaints just to make a few unhappy inmates happy." *Id.*

[57] *See, e.g.*, Connecticut Grievance No. M1403102 ("Connecticut Sample Grievance 1") (complains "No answer given [to] many prior requests"); Delaware Grievance No. 11116 ("Delaware Sample Grievance") (prisoner with Hepatitis C filed grievance in January 2005 that he was not receiving any treatment; grievance was not decided until April 2006; although grievance was decided in favor of prisoner, no treatment was ordered); Lee Williams & Esteban-Parra, *Delaware's Deadly Prisons: Odds Against Inmates in Grievances*, Delaware News Journal (Sept. 25, 2005) (noting complaints that "it can take months – in some cases years – for complaints to be resolved").

[58] *See, e.g.*, Louisiana Grievance No. LSP-2005-1676, First Step Response Form ("Louisiana Sample Grievance 2") (stating that grievance had been "set aside" because another request was pending).

[59] *Blount v. Fleming*, No. 7:04cv00429, 2006 WL 1805853, at *3 (W.D. Va. June 29, 2006).

1774737, at *3-4 (noting that a "name all defendants" rule would require discovery in grievance systems to comport with the policies of § 1983).

There is a real danger that grievance procedures may be used to block prisoners' access to the courts. *Amici* respectfully request that the Court take the opportunity presented by this case to make clear that any grievance policy that denies prisoners an adequate opportunity to exhaust their claims and present them in court is invalid.

CONCLUSION

The decisions of the court of appeals should be reversed.

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APPENDIX

INTERESTS OF *AMICI CURIAE*

The **American Civil Liberties Union** (ACLU) is a nationwide, non-profit, nonpartisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. The **American Civil Liberties Union of Michigan** is a state affiliate of the ACLU.

The **Jerome N. Frank Legal Services Organization of the Yale Law School** (LSO) provides free representation to indigent people in need of legal aid. Since 1970, LSO students have provided legal assistance to incarcerated people, first through a Prison Clinic, and now through both the Prison Clinic and the Complex Federal Litigation Clinic (CFL). Yale students have represented inmates in federal and state courts and before administrative agencies, in a range of proceedings including habeas and civil rights actions, and involving a wide variety of issues. In recent years, LSO has litigated a number of cases involving Prison Litigation Reform Act (PLRA) exhaustion.

The **Legal Aid Society of the City of New York** is a private organization that has provided free legal assistance to indigent persons in New York City for nearly 125 years. Through its Prisoners' Rights Project, the Society seeks to ensure that prisoners are afforded full protection of the constitutional and statutory rights. The Society advocates on behalf of prisoners in New York City jails and New York state prisons, and conducts litigation on prison conditions.

The **Ohio Justice & Policy Center** ("OJPC") is a non-profit, public interest law firm that litigates civil rights cases on behalf of prisoners and formerly incarcerated individuals.

Through its Grievance Project, OJPC educated the Sixth Circuit Court of Appeals about the administrative grievance systems that exist within the states comprising the Sixth Circuit. OJPC was formerly known as the Prison Reform Advocacy Center.

Prison Legal News ("PLN") is non-profit organization that advocates nationally on behalf of those imprisoned in American detention facilities. PLN publishes a magazine by the same name to educate its readers and the general public about the use of the civil justice system for the vindication of fundamental human and civil rights.

Prison Legal Services of Michigan ("PLSM") is a Michigan non-profit, tax-exempt corporation that was founded in 1976. It assists Michigan prisoners in obtaining access to courts through individual advice and self-help packets which it provides free of charge to indigent prisoners. PLSM has served as counsel for all male Michigan prisoners in a state class action. The requirements for exhaustion of administrative remedies is of critical importance to PLSM and its clients.

The **Prisons and Corrections Section of the State Bar of Michigan** provides education, information, and analysis on correctional issues in the state. Through meetings, seminars, a web-site, public service programs, and publication of a newsletter, the Section seeks to serve both its members and the public. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

The **Uptown People's Law Center** ("UPLC") is a non-profit legal service center serving the poor and indigent of Chicago. Among other things, the UPLC represents prisoners challenging prison conditions, parole procedures,

and "good time policies" in the Illinois prison system. UPLC frequently faces the issue of administrative exhaustion, both in its formal litigation, and in addressing the hundreds of letters it receives from unrepresented prisoners seeking advice on how to properly exhaust claims.